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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: NOV 12 2013 OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2).

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's October 26, 2012 decision will be withdrawn. The petition will be remanded.

The petitioner describes itself as a professional health care company. It seeks to permanently employ the beneficiary in the United States as a physical therapist. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The director denied the petition because the petitioner failed to submit the required initial evidence including the posting notice in accordance with 20 C.F.R. § 656.10(d)(1), prevailing wage determination in accordance with 20 C.F.R. § 656.40, uncertified ETA Form 9089, Application for Permanent Employment Certification, and evidence that the beneficiary has an unrestricted license to practice physical therapy or that she possesses the qualifications necessary to take the physical therapist licensing examination.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.¹ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.³

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and

¹ See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i); *see also* 20 C.F.R. § 656.15.

According to 20 C.F.R. § 656.5(a)(1), persons who will be employed as physical therapists must possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy.

According to 20 C.F.R. § 656.15(c)(1), an employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (Sec. 656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under 20 C.F.R. § 656.15 and not under 20 C.F.R. § 656.17.

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by

“providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media” used to distribute the Notice. *Id.*

The instant petition was filed on June 29, 2012 and contained a checkmark in the Part 2.1. box indicating that it was an amendment of a previously filed petition. The previously filed petition was approved by the director on June 18, 2012 for the beneficiary as a Schedule A physical therapist. The instructions for the Form I-140 provide:

If this petition is being filed to amend a previously filed Form I-140 petition, then check the box in **Part 2. Petition Type, Item Number 2.a** [amended March 5, 2013, previously the box was in Part 2, Box 2] of the Form I-140, entitled “To Amend a Previously Filed Petition” and fill in the receipt number of the previously filed petition in the space provided. This will assist USCIS in determining whether the petition may be accepted for filing and the location of the previously filed petition for case matching purposes.

The instructions do not provide that any additional evidence need be submitted with the amended petition. Section 22.2(b)(5)(F) of the Adjudicator’s Field Manual (AFM), Pending or Approved I-140 Petitions with a Subsequent Change in Employer Due to a Transfer of Ownership to a Successor, provides:

Successor-in-interest entities which need to reaffirm the validity of an I-140 petition and the labor certification filed by a predecessor entity must file an amended I-140 petition that demonstrates that a qualifying successor-in-interest relationship exists in accordance with the three successor-in-interest factors described in Section B. above.

Each amended I-140 petition should be supported by:

- Documentation, such as a copy of the Form I-797 approval or receipt notice, that provides the previously filed I-140 petition’s receipt number, and the petitioner’s name and address;
- A statement that provides the alien beneficiary’s name, date of birth, and alien registration number (if any);
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor;
- Documentation to establish the qualifying transfer of ownership of the predecessor to the successor; and
- Documentation from an authorized official of the successor evidencing

the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary.

The petitioner submitted evidence pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) to establish that the petitioner on the instant Form I-140, [REDACTED] is the successor-in-interest to [REDACTED] the petitioner named on the original Form I-140.⁴ In addition, the petitioner submitted evidence to establish that the beneficiary would continue to be employed as a physical therapist at the same location, with the same job requirements, and at a rate of pay in excess of the wage required by the PWD. The petitioner also submitted a copy of the Form I-797 Approval Notice and evidence of its ability to pay the prevailing wage. The petitioner thus submitted all of the documentation required by the AFM for amending a previously approved Form I-140.

As a result, the amendment to the previously filed Form I-140 should be accepted with no further documentation or evidence required. This petition is not currently approvable, however, because the petitioner failed to submit evidence with the original petition of the beneficiary's qualifications.

Specifically, it is noted that the original petition required a bachelor's degree plus five years of experience. The evidence in the record establishes that the beneficiary meets the educational requirement.⁵ However, the letters submitted to verify the beneficiary's experience are insufficient to demonstrate that the beneficiary has five years of full-time work experience in the proffered position. The record includes a certificate of employment from [REDACTED] documenting the beneficiary's full-time employment as a physical therapist from February 11, 2010 to February 28, 2011. The record also includes two certifications from Municipal Health Officers with the [REDACTED] Philippines. The certifications claim that the beneficiary "served and was connected with" the Department of Health as a physical therapist consultant/home health physical therapist from May 1, 2001 to March 30, 2002 and from April 1, 2002 to August 30, 2009. The certifications do not seem to have been written by an employer in accordance with 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A), but rather by former coworkers. Further, the letter does not indicate whether the experience was full-time, and not a contract or part-time position. In addition, the certifications cannot be reconciled with

⁴ An appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

⁵ The record includes a copy of the beneficiary's bachelor of science in physical therapy and academic transcripts from the [REDACTED] Philippines, completed in April 2001.

the ETA Form 9089. The beneficiary indicated on the ETA Form 9089 that she served as a “physical therapist/consultant” with [REDACTED] Philippines from May 2001 to August 30, 2009. No experience with the Department of Health was listed on the Form 9089. It is unclear whether the beneficiary has five years of experience in the proffered position as a physical therapist or in some other position.

As the petitioner has not had an opportunity to address the issue related to whether the beneficiary possesses the full five years of full-time experience required for the position in the original filing, we will remand the petition back to the director to allow the petitioner to address this issue.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner’s eligibility for the visa that were not initially identified by the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision.

ORDER: The director’s decision denying the petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.